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Collective Redress in EU Competition Law: An Open Question with Many Possible Solutions

Arianna ANDREANGELI *

This paper analyses the current trends of the debate in the area of collective redress of injuries caused by the consequences of anti-competitive behaviour in the EU in light of the more recent case law governing class certification of antitrust collective complaints in the US federal courts and of the legislative developments occurring in several European jurisdictions. Whilst not advocating the total ‘transplantation’ of opt-out class actions in EU competition law, it will illustrate that the Commission’s concerns as to the viability of these collective lawsuits have become less pressing and consequently, will argue for a more open-minded discussion of how to create effective and fair mechanisms for the collective redress of individual rights.

It will first provide a brief examination of the current approach adopted by the Commission to collective redress in the area of competition law and, more specifically, in respect to ‘diffuse torts’. Thereafter, the paper will analyse the case law of the US Superior Federal Courts concerning the class certification of collective antitrust complaints and illustrate that the Commission’s scepticism as to the viability of these actions may no longer be justified. It will be shown that the scrupulous scrutiny of the proposed class filings, conducted by the American courts can contribute effectively to ‘identifying’ prima facie unmeritorious claims and thereby allowing only truly ‘suitable’ complaints to proceed as class actions.

In light of the forgoing, it will be concluded that the Commission’s position on these issues seems difficult to sustain and could even become an obstacle to discussing how to respond to the demands of ensuring effective redress to the victims of torts having a widespread impact on society and the economy, for which individual dispute settlement may be inefficient.

1 INTRODUCTION

In February 2011 the European Commission launched a consultation exploring possible avenues toward a ‘coherent European approach to collective redress’ of

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individual rights. This is however not a new concern. From the 1993 Notice on Cooperation with National Courts via the 2004 Green Paper to eventually the 2008 White Paper on antitrust damages the Commission has attempted to address the problem of the continuing (albeit with limited exceptions¹) poor take up of civil action designed to recover damages arising from practices infringing Articles 101 and 102 TFEU and in that context discussed the ability of group litigation to deal with this problem.² Consequently, the 2011 Consultation on collective redress represents a welcome restatement of the Commission's concern for strengthening these tools of 'group justice'. Importantly, the 2011 Document takes this discussion beyond the confines of competition law and into the broader context of tort law, focusing on how to provide redress to individuals affected by 'diffuse' harmful behaviour.³ Slightly less reassuring, however, are many of the premises on which the Commission has placed the debate. Although the Consultation Paper adopts a broad reading of the concept of collective redress, which is defined as 'any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices', it reiterates its long-held distrust for 'US style' opt-out class litigation.⁴

As is well known, Rule 23 of the US Rules of Civil Procedure allow 'one or more members of a class to sue (...) as representative parties on behalf of all members' if the class is so wide as to make joinder 'impracticable', if the action stems from common questions of law or of fact and the claims asserted by the named claimant are 'typical' to the whole class. In addition, the plaintiff must satisfy the court of his or her ability to 'fairly and adequately' represent the class. Having regard specifically to damages' actions, certification for new lawsuits is usually sought under subsection (b)(3) according to which 'the court [must find] that the questions of law or fact common to class members predominate over any

¹ See e.g. A. Komninos, *New prospects for private enforcement of EC competition law: Courage v Crehan and the Community right to damages*, 39 Com. Mkt. L.Rev.447, 450–451 and 467–469 (2002); more recently, Peyer, *Myths and untold stories—private antitrust enforcement in Germany*, UEA—Centre for Competition Policy Working Paper No 10-12, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695.

² See e.g. Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 (hereinafter referred to as 'the 2008 White Paper'), para. 1.1–1.2.

³ European Commission, Joint Information Note: "A coherent approach to European collective redress", Feb. 4, 2011, available at: <http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf>, hereinafter referred to as "2011 Consultation document".

⁴ *Id.*, see especially secs. 17–18.

questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.' Rule 23 also obliges the named plaintiff, if certification is granted, to serve the 'best practicable notice' to all class members; once that requirement is fulfilled, the final judgment will be binding on all class members that have 'not requested exclusion' by exercising their right to 'opt out' of the action within the time limit set in the notice.

The Commission has repeatedly stigmatized these actions, disciplined by Rule 23 of the US Federal Rules of Civil Procedure (hereinafter referred to as FRCP) as a source of 'abuse' and of 'unmeritorious' litigation. According to the 2011 Consultation document, the allegedly 'unlimited' standing to bring these actions, along with other 'incentives to sue', such as, *inter alia*, fee-shifting rules have been regarded in Europe as potentially threatening the integrity of the judicial process. It could be argued that, in light of a number of 'mass tort' lawsuits lodged in the US especially in the 1980s and 1990s, some of these allegations are not entirely ill-founded.⁵ However, it is suggested that the evolution of the standing inquiry and of the interpretation of some of the class certification standards in the US courts' case law may make these allegations more difficult to support.

This paper does not advocate the total 'transplantation' of opt-out class actions in EU competition law. Instead, it will illustrate that many of the Commission's concerns have become less pressing and consequently, will argue for a more open-minded discussion of the options available to create efficient and effective mechanisms for the collective redress of individual rights, coupled with safeguards against abuse.⁶ It will first provide a brief examination of the current approach adopted by the Commission to collective redress in the area of competition law and, more specifically, in respect to 'diffuse torts'.

It will be argued that the Commissions' views, that are poised clearly against the introduction of 'US style', opt-out class actions risk preventing a wider-ranging discussion as to what is the most suitable option to ensure effective access to justice as well as efficient adjudication, especially by preventing repetitive filings. For this purpose, the paper will analyse the case law of the US Superior Federal Courts concerning the class certification of collective complaints under Rule 23(b)(3) of the FRCP. It will be illustrated that the Commission's scepticism as to the viability of these actions may no longer be fully justified. In particular, it will be shown that the scrupulous scrutiny of the proposed class filings, conducted by the American courts can contribute effectively to 'identifying' *prima facie*

⁵ 2011 Consultation Document, paras 17–18.

⁶ See *id.* at para. 17. See *inter alia* *Re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305 at 311.

unmeritorious claims and thereby allowing only truly ‘suitable’ complaints to proceed as class actions.

Thus, it will be concluded that the Commission’s position on these issues seems increasingly out of step with the US Courts’ more recent jurisprudence as well as of the experience of several Member States in this area, and could even become an obstacle to a broad, principled discussion of the question of how to respond to the demands of ensuring effective redress to the victims of not only antitrust infringements but also of other torts having a widespread impact on society and the economy, for which individual dispute settlement may be inefficient.

2 THE EMERGENCE OF COLLECTIVE REDRESS AS A ‘LIVE ISSUE’ FOR THE COMMISSION IN COMPETITION ENFORCEMENT

2.1 THE EVOLUTION OF THE EU AGENDA FOR GROUP ACTIONS: A SHORT SUMMARY

The question of how to boost the currently ‘patchy’ and relatively scarce rate of private claims based on an infringement of the EU Competition rules has been at the forefront of the European Commission’s agenda for nearly twenty years and this paper cannot exhaustively comment on this debate.⁷ As is well known, the take up of actions for damages arising from the impact of anti-competitive behaviour, sanctioned by the Court of Justice of the EU in *Crehan*⁸ and *Manfredi*,⁹ has been very limited in the great majority of the Member States,¹⁰ with Germany a notable exception to this trend.¹¹

To respond to the concerns associated with a perceived lack of ‘restoration’ of these losses, the Commission proposed in its 2008 White Paper, among other measures, the creation of new (or the strengthening of existing) tools for the collective redress as a means to boosting the access to the courts of those

⁷ See Commission White Paper on Modernisation of the rules implementing Articles 85 and 86 EC Treaty [now 101 and 102 TFEU], [1999] OJ C132/1 (hereinafter referred to as 1999 White Paper), especially paras 6, 8–10; for commentary, see e.g. Wouter Wils, *Should private antitrust enforcement be encouraged in Europe?*, 26 *World Competition* 473 (2003) ; also A. Komninos, *Public and private antitrust enforcement in Europe: complement? Overlap?*, 3 *Competition L. Rev.* 5 (2006).

⁸ Case C-453/99, *Courage v. Crehan* [2001] ECR I-6297, paras 19–23; see also para., 24–27 and 31.

⁹ Case C-295/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, paras 60–61; also case C-101/04, *Cipolla v. Fazari* [2006] ECR I-11421, paras 46–47; see also paras 62–64.

¹⁰ See D Waelbroeck, D Slater and G Even-Shoshan, ‘Study on the conditions of claims for damages in case of infringement of the EC competition rules’, Aug. 31, 2004, Comparative Report, para 1; also Rodger, *Competition law litigation in the UK*, 27 *Eur. Competition L. Rev.* 235, 241–242 (2006) .

¹¹ Peyer, ‘Myths and untold stories – private antitrust enforcement in Germany’, UEA – Centre for Competition Policy Working Paper No 10–12, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695, especially pp. 27–28.

individuals or businesses adversely affected by unlawful practices.¹² It was suggested that ‘bundling together’ a large number of small value claims would minimize the costs and the difficulties as well as eliminating the risk of repetitive adjudication associated with bringing these actions individually.¹³

However, the Commission’s proposals were limited to the introduction of opt-in actions and of claims brought by representative bodies (such as consumer associations) on behalf of their members. Despite their successful record in this area, ‘US style’ opt-out class actions were rejected on the ground that they would create an unacceptable risk of ‘over-deterrence’ and over-compensation of prima facie unlawful behaviour and would also endanger the overall fairness of the adjudicative process, by encouraging ‘groundless’ claims.¹⁴ It should be emphasized that the range of options envisaged by the Commission remains equally limited today: in its 2011 Consultation document the Commission rejected opt-out class actions as ‘inappropriate’ and as potentially capable of transforming the ‘compensatory’ nature of the damages’ remedy, not just in competition law but in the general context of EU law, into a punitive tool.¹⁵ It also confirmed its concerns for the risk of ‘abuse’ of the judicial process that it had repeatedly associated with these actions.¹⁶

It is acknowledged that much of the Commission’s scepticism as regards the viability and the overall fairness of Rule 23(b)(3) FRCP actions is not totally unfounded but stems from the notorious examples of certification of actions involving ‘sprawling classes’ (for instance, in the litigation concerning the victims of asbestos exposure-related illnesses) and often resulting in ‘deep pocket’

¹² Commission Green Paper—Damages actions for breach of the EC antitrust rules, COM(2005) 0672 Final, SEC (2005) 1732, hereinafter referred to as ‘the 2005 Green Paper’, paras 5–6; see also 2005 Staff Working Paper accompanying the 2005 Green Paper, paras 188 and 193–194. For commentary, *inter alia*, David Rosenberg, *The regulatory advantage of class actions*, in *Regulation through Litigation* 272–274 (W. Kip Viscusi ed., AEI Brookings Institution Press 2002); also, more generally, Deborah R. Hensler et al., *Class Actions Dilemmas*, 407–410 (RAND Institute 2000).

¹³ See e.g. Benston, *A comprehensive analysis of the determinants of private antitrust litigation, with particular emphasis on class action suit and the rule of joint and several damages*, in *Private antitrust litigation: new evidence, new learning*, 271 (L.J. White ed., MIT Press 1988).

¹⁴ See e.g. 2008 Impact Assessment Document, para. 119; see also White Paper, Commission Working Document SEC(2008) 404 (hereinafter referred to as ‘the 2008 Working Document’), para. 58. For commentary, see e.g. T.L. Russell, *Exporting class actions to the European Union*, 28 B.U. Intl. L.J. 141, 152 ff. (2010); also, more recently see the response of the European Competition Lawyers’ Forum, (ECLF) to the 2011 Consultation document, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/ecdf_en.pdf, pp. 6–11; see also, *inter alia*, Denozza and Toffoletti, “Compensation function and deterrence effects of private actions for damages: the case of antitrust damages suits”, March 2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1116324, pp. 5–7; see also pp. 20–25.

¹⁵ 2011 Consultation document, paras 7–9 and 20–22; see also response of the UK Competition Law Association to the 2011 Consultation document, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/uk_cla_en.pdf, section 2.

¹⁶ 2011 Consultation Document, paras 8–9.

defendants being able to buy impunity for the harmful consequences of their conduct.¹⁷ However, it is legitimate to ask whether these concerns are tenable today. It may also be queried whether the judicial practice of granting certification only on the basis of a 'broad' finding of the existence of 'common questions' has been reined in by the US Federal Courts.

2.2 THE US FEDERAL COURTS AND CLASS CERTIFICATION IN ANTITRUST CASES: SELECTING 'MERITORIOUS' GROUP CLAIMS?

Having outlined the Commission's position as regards the suitable options for collective redress in the EU, this section will discuss them in light of the more recent case law of the US Federal Courts concerning class certification of antitrust group complaints. It was anticipated that much of the criticism levelled against the use of Rule 23(b)(3) FRCP had originated from an 'improper' application of this provision in cases which, due to the widespread and diverse nature of the proposed classes, turned out to be unsuitable to class treatment.¹⁸ In this specific respect, it is well known that already in the 1990s the US Supreme Court had denounced similar cases as examples of an 'adventuresome use' of Rule 23(b)(3), which should therefore be avoided in the future.¹⁹

This position should be contrasted with the views expressed in respect to collective antitrust complaints, which have, instead, been consistently regarded as suitable to class litigation. In *Hawaii v. Standard Oil Co* the US Supreme Court held that granting class certification in these cases could contribute to achieving key policy goals, by reinforcing 'the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture'²⁰ vis-à-vis economically powerful defendants. As a result of certification large number of claimants, who would otherwise have little chance of having their day in court would be able to seek redress for the harmful consequences of pervasive and often unnoticed injuries.²¹ It was added that lodging class complaints

¹⁷ *Amchem Products Inc. v. Windsor*, 521 U.S. 591 at 598–599, 625; see also *Georgine v. AmChem Products Inc.*, 157 FRD 246. For commentary, see e.g. Deborah R. Hensler et al., *Class action dilemmas*, 10–11, 114–116 (RAND Publishing Ltd 2000); see also John Coffee, *The corruption of the class action*, 80 Cornell L Rev 851, 854–855 (1995).

¹⁸ See e.g. *Amchem Products Inc. v. Windsor*, 521 US 591 at 598–599, 625; see also *Georgine v. AmChem Products Inc.*, 157 FRD 246.

¹⁹ See e.g. *Georgine v. AmChem Products Inc* (Court of Appeals, 3rd Circuit), 83 F.3d 610 at 623; see also 630–631; see also W. Schwarzer, *Settlement of mass tort class actions: order out of chaos*, 80 Cornell L Rev 837, 839 (1995).

²⁰ *Hawaii v. Standard Oil*, 405 US 251 at 266.

²¹ See e.g. *Zenith Radio Corp v. Hazeltine Inc*, 395 US 100 at 130–131.

complemented the role of public enforcement since it would bring before the courts alleged infringements that may not otherwise have been detected.²²

However, the suitability of class litigation to collective damages claims based on Section 4 of the Clayton Act does not stem only from policy reasons. It is clear from the relevant case law that these actions²³ tend to conform to the certification criteria of Rule 23(b)(3) more readily than other ‘mass accident’ claims which, by the nature of the damage suffered by the claimants, often give rise to a vast array of questions that are peculiar to individual class members.²⁴ It was explained in, *inter alia*, *Weeks v. Bareco Oil Co* that although class members could be affected by prima facie anti-competitive behaviour with varying intensity and consequently could claim different amounts of damages,²⁵ the ‘gist’ of their claim would remain the same, i.e. ‘the alleged damage [arising] from the alleged wrongful act’ committed by the same defendant.²⁶ So long as (1) the existence of a conspiracy to constrain rivalry on the market or of unilateral acts of monopolization, (2) the occurrence of direct injury to the class members’ property or businesses and (3) the existence of a nexus of causality between the conduct and the loss suffered are capable of proof on the basis of ‘generalised evidence (...) on a simultaneous class-wide basis’,²⁷ certification would often be forthcoming.²⁸

The scope and the degree of complexity of the assessment to be conducted under Rule 23(b)(3), however, can vary according to the nature of the alleged breach. Thus, in relation to collective claims of price-fixing, it was held that ‘because the gravamen of [the] (...) claim is that the price in a given market is artificially high’, the certifying judge would generally conclude that all purchasers of the same product on that market have been affected by the practice in a similar way and, consequently, their loss could be proven via common evidence.²⁹ The inquiry can instead become more complex when certification is sought for complaints alleging ‘less serious’ infringements, such as those occurring in the context of vertical relationships or arising from allegedly unlawful tying. For instance, in *Ungar* the 3rd Circuit of the Court of Appeals held that the need to prove individual coercion when the plaintiffs could not rely on any contractual

²² See e.g. *Blue Shield of Virginia v. McCready*, 457 US 465 at 472; for commentary, *inter alia*, B. Kaplan, *Continuing the work of the Civil Committee: 1966 amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 397–398 (1967); also Aareda & Hovenkamp, *Principles of US Antitrust Enforcement*, 3rd Ed., Vol. IIA, pp. 68–70; also Jones, *Private enforcement of antitrust law in the EU, US and the UK*, 168–169 (OUP 2000).

²³ See *inter alia* *Mullarkey v. Holsum Bakery*, US DC Ariz., (1988) 120 FRD 118 at 120–121.

²⁴ Advisory Committee’s Notes to proposed rules of Civil Procedure, 39 FRD 69 at 103.

²⁵ *Weeks v. Bareco Oil Co*, 125 F2d 84 at 91.

²⁶ *Id.*

²⁷ *Re: Foundry Resins Antitrust Litigation*, 242 FRD 393 at 409.

²⁸ For commentary, see Newberg, section 18:25.

²⁹ In *re: Potash Antitrust Litigation*, 159 FRD 682 at 695–696; also in *Re: Foundry*, *supra* n. 46, at 410.

‘tie-in’ clause as part of a uniformly applicable commercial arrangements would be incompatible with class certification,³⁰ since in that case ‘common evidence’ of an essential element of the alleged offence was lacking.³¹

Although the implications arising from the more recent case law concerning the ‘predominance’ inquiry will be examined in more detail below, it can be concluded that US opt-out class actions have been successfully deployed to reconcile the goal of access to justice with the needs of due process and of efficient adjudication. While the use of these lawsuits in mass injury cases was widely criticized, it is clear that the same concerns may not be so significant in respect to allegations of antitrust infringements, especially the most serious ones.

2.3 CAN ‘ANYONE’ REALLY SUE? ADMISSIBILITY AND CLASS CERTIFICATION IN ANTITRUST CASES: ‘ANTITRUST INJURY’, ‘COMMONALITY’ AND ‘PREDOMINANCE’

Having illustrated the principal features of the ‘opt out’ class action model underpinning Rule 23(b)(3) FRCP, the analysis will now turn to a more detailed consideration of the US Federal Courts’ approach to certification of class antitrust lawsuits. As anticipated in section 2.2 the conditions enumerated in Rule 23(b)(3) respond to the need to achieve goals of efficient and fair adjudication of collective lawsuits first and foremost by ensuring the ‘cohesiveness’ of the proposed classes,³² as is especially apparent in respect to assessment of the standing condition of ‘antitrust injury’.³³

Although the limited scope of this work does not allow an analysis of the questions associated with *locus standi*, it is indispensable to recall that this concept was introduced by the US Congress to limit access to the Courts to claimants alleging losses arising from prima facie anti-competitive behaviour that the Act was designed to forestall.³⁴ The US Supreme Court held in *Brunswick* that damage linked to a prima facie antitrust infringement by a nexus of causality would only be compensable under Section 4 of the Clayton Act if it was among those losses that the Act was aimed at preventing, i.e. damage arising from the adverse impact of a reduction of competition on the plaintiff’s business or property.³⁵

³⁰ *Ungar et al. v. Dunkin’ Donuts Inc.*, 531 F2d 1211 at 1224.

³¹ *Id.*, at 1216. Cf. *inter alia*, *McDonough v. Toys’R’Us*, 638 F Supp 2d 461, especially at 481–483.

³² See e.g. *In Re: Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 at 311. For commentary see Joshua P. Davis & Eric L. Cramer, *Antitrust, class certification and the politics of procedure*, 17 Geo. Mason L Rev 969 (2010).

³³ *Re: New Motor Vehicles Canadian Antitrust Litigation*, 522 F3d 6.

³⁴ See e.g. *Reiter v. Sonotone Corp.*, 442 US 330 at 337; also *Brunswick v. Pueblo-O-Mat*, 429 US 477 at 484–485.

³⁵ *Brunswick v. Pueblo-O-Mat*, 429 US 477 at 488.

In the *McCready* decision it was held that in accordance with principles of causation and remoteness of the injury³⁶ this appraisal should encompass both ‘the physical and economic nexus between the alleged violation and the harm suffered’ by the claimant and ‘the relationship of the injury alleged with those forms of injury’ that the Clayton Act had been designed to prevent:³⁷ so long as the plaintiff could make a showing that the loss he or she had suffered was a ‘clearly foreseeable’ consequence of the ‘means by which [the respondent] had sought to achieve its illegal ends’,³⁸ he or she could stand in judgment against the defendant.³⁹

It is therefore clear that the notion of ‘antitrust injury’ encompasses all forms of loss that in the intention of Congress are among those that the Clayton Act was designed to prevent, having regard to the nature of the practice, the extent to which the injury was a direct or indirect consequence of the alleged infringement and the degree of ‘speculation’ characterizing the claim.⁴⁰ It is emphasized that these considerations are crucial for the certification inquiry, due to the complexity of the theories often proposed to demonstrate the existence of harm and to any individual circumstances affecting only certain class members, even though the ‘nucleus of facts’ is common to all.⁴¹

Accordingly, the certifying courts have adopted a very careful attitude to the certification appraisal, even in *prima facie* relatively ‘straightforward’ cases. In respect to the ‘commonality’ inquiry, it has often been held that each action, to merit class treatment, must not only concern facts whose adverse consequences are broadly common to a potentially wide group of individuals or businesses.⁴² It is also indispensable to demonstrate, already at an early stage of the litigation, that all the elements of a *prima facie* antitrust infringement, including the alleged injury, are amenable to proof on a class-wide basis.⁴³

A similar approach has also been adopted for the appraisal of the ‘predominance’ of common over individual issues of law or of fact⁴⁴ which seeks

³⁶ *Blue Shield of Virginia v. McCready*, 457 US 465 at 477.

³⁷ *Id.*, at 478.

³⁸ *Id.*, at 479.

³⁹ *Id.*, at 483–484.

⁴⁰ *Associated General Contractors of California Inc v. California State Council of Carpenters*, 459 US 519 at 538–539; see also 541–43; also *Illinois Brick Co v. Illinois*, 431 US 720 at 744–745.

⁴¹ See *inter alia* *Eisen v. Carlisle & Jacquelin*, 417 US 156 at 177–178.

⁴² *Inter alia*, see *Brown v. Cameron-Brown Co*, 92 FRD 32 at 38.

⁴³ *Id.* See also, *inter alia*, *Times Picayune Publishing v. US*, 345 US 594 at 605; Ungar, *supra* n. 30, at 1218 and 1224; *Young v. Jo-Ann Nut House*, unrep., available at: 1980 WL 1987, pp. 5–8. See also, *mutatis mutandis*, most recently, *Wal-Mart Stores Inc v. Dukes et al.*, judgment of June 20, 2011, not yet reported, available as 2011 WL 2437013, especially at 4–7.

⁴⁴ See *inter alia*, *Eisen v. Carlisle & Jacquelin*, 417 US 156 at 177–178. For commentary, see B. Kaplan, *Continuing work of the Civil Committee: 1966 amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 389–390 (1967); also Newberg, 4th Ed., sect. 4:24, p. 155.

to avoid ‘mini-trials’ concerning individual class members at the merits’ stage.⁴⁵ It was held in *Visa Check*, a decision concerning the certification of a class complaint of unlawful tying, that to meet the ‘predominance’ requirement the plaintiffs must proffer a ‘common theory of injury’ and demonstrate that this injury could be ascertained through proof common to all members of the class,⁴⁶ for instance by relying on evidence of a common contractual obligation imposed on the class as a whole.⁴⁷ As to the element of antitrust injury,⁴⁸ this requirement would be fulfilled if the existence of loss could be proven via a common method, regardless of whether the size of individual claims required individualized calculation.⁴⁹

A similar approach was adopted by the District Court for Missouri in the *Re: Catfish Antitrust Litigation* decision, concerning allegations of unlawful retail price maintenance arrangements agreed by catfish producers and processors, which at the time were treated as a ‘per se’ offence.⁵⁰ The Court took the view that as a result of these practices, all purchasers of these products had been hit by artificially high prices and were therefore likely to have suffered ‘the same type of injury by paying more (...) than would have happened in a truly competitive environment’.⁵¹ On that basis, the Court granted certification, holding that due to the nature of the allegations and of the evidence offered, especially in respect to the allegation of ‘antitrust injury’, the named plaintiff had made a sufficiently convincing ‘threshold showing’ of the ‘common’ impact of the alleged infringement.⁵²

In light of the above analysis, it may be argued that common issues arising from allegations of antitrust infringements are likely to ‘predominate’ over individual ones if the plaintiffs can offer prima facie common proof of all the elements of the alleged infringement and especially of its impact on all members of the class. However, it is equally apparent that the certifying courts in the cases discussed above reached their decision on the basis of a ‘meticulous’ review of the evidence offered by both parties, including that of an expert nature, as well as of their arguments.⁵³ Some authors questioned the breadth of this inquiry and argued that it may result in placing an undue burden on the named plaintiff, who

⁴⁵ See, *inter alia*, *Collective Buyers League v. F & F Investments*, 48 FRD 7 at 1112; also, *mutatis mutandis*, *Sommers v. Abraham Lincoln Federal Savings and Loans Association*, 66 FRD 581 at 590–591.

⁴⁶ 192 FRD 68 at 84–85 and 87–88; see also in *Re: Visa Check Master Money Antitrust Litigation*, 280 F3d 124 at 130.

⁴⁷ *Id.*, at 136.

⁴⁸ *Id.*, at 137.

⁴⁹ *Id.*, at 139–140; see also, *inter alia*, *Re: Fine Paper Antitrust Litigation*, 82 FRD 143 at 154.

⁵⁰ *Re: Catfish Antitrust Litigation*, 826 F Supp 1019.

⁵¹ *Id.*, at 1040.

⁵² *Id.*, at 1041–1042. See also, e.g., In *Re: Master Key antitrust litigation*, 528 F2d 5 at 12; *Graphic Products Distributors v. Ilek Corp.*, 717 f2d 1569 at 1578–1579; *J Truett Payne Co Inc v. Chrysler Motors Corp.*, 451 US 577 at 565–566.

⁵³ See e.g. *id.*, at 1030 ff.; also *Catfish*, *supra* n. 50, at 137 ff.

would have to ‘frontload’ the evidence in support of his or her case, as well as hampering the due process rights of defendants, who would not enjoy all the benefits of a full trial.⁵⁴

For a time at least, the US Federal Courts, mindful of these concerns, seemed reluctant to engage in any in-depth review of merits questions at certification stage. A number of courts relied on the Supreme Court’s decision in *Eisen and Carlisle & Jacqueline*, in which the Court read Rule 23 as not authorizing the certifying judge to carry out a ‘preliminary inquiry’ into the merits of the lawsuit to decide on certification⁵⁵ on the ground that such a ruling would unduly advantage the plaintiff by offering him or her a determination on the merits of his or her case without satisfying the certification criteria and hamper the defendant’s right to be tried with the assistance of all the safeguards of a full trial.⁵⁶ For instance, the 9th Circuit held in *Re: Telephone Charges*, concerning an allegation of price fixing in the hospitality industry, that the certification inquiry should be limited to the question of whether the Rule 23(b)(3) conditions had been met in each case:⁵⁷ while this examination normally required consideration of the factual and legal questions raised in the complaint, it could not go as far as to decide which of the parties was likely to succeed in the litigation.⁵⁸

Later decisions, however, made clear that the ‘cautious’ approach adopted in *Eisen* should be limited to questions concerning the allocation of notice costs.⁵⁹ The US Supreme Court explained that certification decisions inevitably ‘involve considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action’⁶⁰ and consequently, may require the judge deciding on certification to ‘probe behind the pleadings’,⁶¹ with a more scrupulous inquiry whose outcome can be modified at a later stage when deciding on the merits of the case.⁶² As a result, in *Blades v. Monsanto*, a case concerning allegations of price-fixing, the 8th Circuit of the Court of Appeals took the view that to determine whether common questions predominated over individual ones, the

⁵⁴ See e.g. *Eisen v. Carlisle and Jacqueline*, 417 US 156 at 177; for commentary, see e.g. Samuel M. Hill, *Small claimants and class actions: deterrence and due process examined*, 19 Am. J. Tr. Advoc. 147, 150–152 (1995–1996); also Evans, “The new consensus on class certification”, Occasional Paper, January 2009, available at: <http://ssrn.com/abstract=1330594>, pp. 2–3.

⁵⁵ *Eisen*, *supra* n. 73, at 177–178. See also, *inter alia*, *Re: Potash Antitrust Litigation*, 159 FRD 682 at 688–689.

⁵⁶ *Id.* at 178. See also, *inter alia*, *Re: Potash Antitrust Litigation*, 159 FRD 682 at 688–689.

⁵⁷ In *Re: Hotel Telephone Charges*, 500 F.2d 86 at 90.

⁵⁸ *Id.*, at 91–92.

⁵⁹ See e.g. *mutatis mutandis*, In re: Initial Public Offerings Securities Litigation, 471 F.3d 24 at 39–41; also *General Tel. Co of Southwest v. Falcon*, 457 US 147 at 160; more recently, see In re: Live Concert Antitrust Litigation, 247 FRD 98 at 107.

⁶⁰ *Coopers & Lybrand v. Livesay*, 437 US 463 at 469.

⁶¹ *Id.* See also *Falcon*, *supra* n. 59, at 160.

⁶² *Falcon*, *supra* n. 78, at 160–161.

Court would have to ‘conduct a limited preliminary inquiry, looking behind the pleadings’, on whether in light of the factual circumstances of the case, ‘if the plaintiffs’ general allegations are true, common evidence could suffice to make out a prima facie case for the class.’⁶³

Although the Court recognized that this appraisal could require ‘dabbling’ in the merits of the case, it emphasized that its scope would be limited to what was ‘necessary to determine the nature of the evidence’ prima facie supporting the class’s case and be especially cautious when touching on issues at the core of the dispute.⁶⁴ The Court looked closely at the expert evidence offered by the named plaintiff and held that impact could not be ‘assumed’ on the basis of a mere presumption that the conspiracy had been implemented in a way which was ‘consistent’ across the whole class.⁶⁵ It took this view due to the inconsistencies affecting supply and demand conditions and to the ‘localised’ nature of the industries affected, antitrust impact could not be proven via class-wide evidence,⁶⁶ thus precluding certification.⁶⁷ Although it was couched in relatively ‘cautious’ and ‘moderate’ language, the *Blades* decision had a significant impact on later case law, by laying down the standards governing the inquiry as to the commonality and the predominance of common over individual issues in antitrust class complaints.⁶⁸

The 1st Circuit of the Court of Appeals held in *Re: New Motor Vehicles*, a class complaint concerning allegations of a suppliers’ conspiracy to prevent the unofficial imports of cheaper Canadian cars into the US, that while antitrust claims seldom presented difficulties in establishing the commonality of factual and legal questions they may be more problematic when it came to considering the ‘predominance’ of common over individual questions.⁶⁹ In that case, the class plaintiff sought an injunction against the manufacturers alleging threatened antitrust injury under Section 4 of the Clayton Act. After having concurred with the district court on the findings of adequacy of representation, numerosity and commonality of issues of law and fact, the Court turned to consider the ‘predominance’ condition and held, citing *Blades*, that this assessment should require a far more searching inquiry than that adopted in *Eisen*,⁷⁰ encompassing

⁶³ 400 F.3d 552 at 566.

⁶⁴ *Id.*, at 567.

⁶⁵ *Id.*, at 570.

⁶⁶ *Id.*

⁶⁷ *Id.*, at 569–570.

⁶⁸ For commentary, see e.g. Nagareda, “Common answers for class certification”, Vanderbilt Public Law Research Paper No 10-33 at 4–5 and 15–16.

⁶⁹ In *Re: New Motor Vehicles Canadian Antitrust Litigation*, 522 F.3d 6 at 18–19.

⁷⁰ *Id.*, at 19–20.

the question of whether ‘the fact of antitrust violation and the fact of antitrust impact [could] be established via common proof’.⁷¹

It was recognized that the nature of the ‘predominance’ inquiry had been shifting for some time from a ‘less probing’ scrutiny to a more searching examination of the arguments and expert evidence deployed by the parties.⁷² Thus, the Court took the view that its appraisal should extend ‘beyond the pleadings’, even when this overlapped with merits questions, to ensure that costly and time-consuming class litigation would only be allowed where ‘appropriate’, i.e. where it was capable of delivering benefits of efficiency and fairness in adjudication.⁷³ It was emphasized the ‘novel’ and ‘complex’ nature of the theory proposed by the plaintiffs and stated that only a ‘rigorous’ and ‘searching’ inquiry would have been sufficient to fulfil the function of the predominance criterion.⁷⁴ On that basis, the decision was reversed⁷⁵ on the ground that the plaintiff had failed to establish that their ‘presentation of the case [could have been made] through means amenable to the class action mechanism’, i.e. upon class-wide evidence as to all the elements of an antitrust infringement.⁷⁶ The Court stressed that it was not ‘looking (...) for hard factual proof but for a more thorough explanation of *how* the pivotal evidence behind plaintiff’s theory [could] be established.’⁷⁷

It is difficult to downplay the importance of the *Blades* and the *Re: New Motors* decisions: some commentators read these judgments as limiting certification to those complaints that were truly suited to class adjudication because they would not have required individualized determination of key elements of the alleged antitrust infringement.⁷⁸ Other authors, instead, argued that the novelty of the economic arguments raised by the class plaintiff to argue that he or she had suffered harm common to the class may have weighed heavily in the court’s decision to adopt a cautious approach to the ‘predominance’ inquiry.⁷⁹

⁷¹ *Id.*, at 20.

⁷² *Id.*, at 22.

⁷³ *Id.*, at 25.

⁷⁴ *Id.*, at 25–26.

⁷⁵ *Id.*, at 21.

⁷⁶ *Id.*, at 29.

⁷⁷ *Id.*

⁷⁸ See *id.*, at 27–28; also *Blades*, *supra* n. 63, at 570. For commentary, see e.g. R. Marcus, *Reviving judicial gatekeeping of aggregation: scrutinizing class certification*, 79 George Washington L. Rev. 324, 353–354, 359–360 (2011); also Bozanic, *Striking an efficient balance: making sense of antitrust standing in class action certification motions*, Pennsylvania State University Dickinson School of Law, Legal Studies Research Paper No 17-2010, available at: <http://ssrn.com/abstract=1556016> at 34–35.

⁷⁹ See e.g. Nagareda, *Common answers for class certification*, Vanderbilt Public Law Research Paper No 10-33 at 15–16; also James F. Nieberding & Robin Cantor, *Price dispersion and class certification in antitrust cases: an economic analysis*, 14 J. Leg. Econ. 61, 65–66 (2007) .

Later decisions⁸⁰ suggest that the ‘rigorous inquiry’ adopted in *New Motors* has come to govern the predominance inquiry also in cases concerning very serious allegations of anti-competitive practices.⁸¹ *Re: Hydrogen Peroxide* arose from allegations of price-fixing made by a number of direct purchasers, who sought certification under Rule 23(b)(3) alleging loss arising from a prima facie overcharge. The respondents however, appealed against the District Court’s decision granting certification on the ground that the ‘predominance’ condition had not been fulfilled.⁸² The 3rd Circuit of the Court of Appeals took the view that all the elements of an antitrust claim should be amenable to class-wide proof for the purpose of granting certification and emphasized that this would be crucial for the antitrust injury, which for its very nature often required individual, as opposed to collective proof.⁸³ Thus, the Court held that, although the named plaintiff was not obliged to prove the existence of injury at such an early stage of litigation, since this matter could only be decided after a full trial,⁸⁴ it was incumbent on him or her to show that this, along with the other indispensable features of an antitrust claim, was ‘capable of proof at trial through evidence that [was] common to the class rather than individual to its members’,⁸⁵ having regard especially to the ‘method or methods [being] proposed to (...) prove impact’ at trial.⁸⁶

In light of the above, the Court of Appeals vacated the District Court’s certification decision: it was held that the judge seized with the admissibility of the class complaint should determine ‘how’ the proposed collective claim will be tried in court⁸⁷ and especially answer the question of whether, ‘on a preponderance of evidence’, all the certification requirements and especially the predominance condition have been fulfilled.⁸⁸

Having regard especially to antitrust damages’ claims, it was observed that the fact that these lawsuits were generally well-suited for class treatment did not authorize the District Court to ‘relax’ its certification analysis. Instead, the certifying judge remained obliged to apply the ‘rigorous’ inquiry standards, elaborated in *Blades* and to ‘weigh in’ the arguments raised by each party⁸⁹ and, in that context, to test the credibility and soundness of the expert evidence adduced

⁸⁰ See e.g. In *Re: Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305; also, *mutatis mutandis*, *Wal-Mart Stores Inc v. Dukes*, 131 S. Ct. 2541.

⁸¹ In *Re: Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305.

⁸² *Id.*, at 310.

⁸³ *Id.*

⁸⁴ *Id.*, at 311.

⁸⁵ *Id.*, at 312.

⁸⁶ *Id.*

⁸⁷ *Id.*, at 318.

⁸⁸ *Id.*, at 319.

⁸⁹ *Id.*, at 321–322.

in their support.⁹⁰ On that basis, the appellate court accepted as ‘plausible’ the conclusion that the alleged conspiracy may ‘in theory, impact the entire class despite a decrease in price for some customers’, occurring at different times and for different amounts.⁹¹ However, it emphasized that the District Court had endorsed ‘uncritically’ the method proposed by the plaintiff to explain how all the elements of the alleged breach, including antitrust impact, could have been proven on a class-wide basis.⁹²

The Court of Appeals took the view that the certifying judge, instead, should have considered whether the thesis he proposed could have been reconciled with apparently contrasting evidence, pointing instead to the absence of common impact across the class.⁹³ Having regard especially to the ‘predominance’ inquiry, the 3rd Circuit dismissed the certifying judge’s approach and held⁹⁴ that the District Court should have addressed more openly the question of whether, despite the pricing and supply differences that had been alleged, the element of antitrust harm could have been established via the common theoretical framework proposed by the plaintiff’s expert witness.⁹⁵ The appellate court made clear that this appraisal should not have been withheld on the sole ground that it could ‘overlap’ with the merits of the case; instead, it emphasized that such a careful scrutiny of the class complaint was required by the very function of the requirements of Rule 23(b)(3) FRCP and would in any event have been open to full review at the merits’ stage.⁹⁶

It is argued that the Court of Appeals started a ‘minor revolution’ in the approach to the certification inquiry in antitrust claims, by moving from a relatively ‘trusting’ attitude to the appraisal of specific complaints to a far more searching approach to questions of ‘predominance’ of common over individual issues with a view to determining whether the claim is ‘well-suited’ to class litigation, not just in theory but in practice.⁹⁷ It is submitted that this approach is consistent with the function of the certification courts as ‘gatekeepers’ of the

⁹⁰ *Id.*, at 323.

⁹¹ *Id.*

⁹² *Id.*, at 325.

⁹³ *Id.*

⁹⁴ *Id.*, at 326.

⁹⁵ *Id.*, at 325.

⁹⁶ *Id.*, at 324.

⁹⁷ See especially *Wal-Mart Stores Inc v. Dukes*, 131 S. Ct. 2541, especially pp. 2547–2551 and 2555–2557; for commentary, e.g. Nagareda, *Common answers for class certification*, Vanderbilt Public Law Research Paper No 10–33 at 15–16; also James F. Nieberding & Robin Cantor, *Price dispersion and class certification in antitrust cases: an economic analysis*, 14 J. Leg. Econ. 61, 65–66 (2007) ; most recently, see Malveaux, *Class actions at the crossroads: an answer to Wal-Mart v Dukes*, The Catholic University of America, Columbus School of Law, Legal Studies Series, paper No 2011–6, available at <http://ssrn.com/abstract=1791743>, pp. 21 ff.

certification process and with the 'exceptional' nature of class litigation,⁹⁸ which should be confined to those disputes which, due to the nature of the complaint, to the evidence and pleas made by the parties, are truly capable of being fairly and effectively adjudicated by representation.⁹⁹

However, it is undisputable that enhancing the judicial discretion in this appraisal is likely to have a significant impact on the actual availability of certification.¹⁰⁰ Commenting on *Re: Hydrogen Peroxide*, some authors welcomed the rigorous scrutiny standard, on the ground that it would act as a 'filter' to ensure that the class litigation device be available only to 'meritorious' claims¹⁰¹ and would therefore contribute to the overall fairness of the judicial proceedings.¹⁰² on this point, it was argued that since certification often constituted the 'trigger event' for starting settlement negotiations, restricting it to cases that were at least suitable for class treatment would prevent the defendant from being exposed to sometimes extensive threats of liability in 'dubious' cases.¹⁰³

Other commentators, however, objected to the application of such a strict attitude to certification especially to antitrust cases on the ground that it may discourage claimants from filing new claims.¹⁰⁴ Evans argued that by requiring plaintiff counsel to spell out all his or her arguments and evidence at such an early stage would, on the one hand, force claimants to seek out complex and costly technical evidence without the benefits of full discovery¹⁰⁵ and, on the other hand, allow economically powerful defendants to exploit the bias built in the

⁹⁸ Wal-Mart, *supra* n. 97, at 2550. For commentary, see *inter alia*, Malveaux, *Class actions at the crossroads: an answer to Wal-Mart v Dukes*, The Catholic University of America, Columbus School of Law, Legal Studies Series, paper No 2011-6, available at <http://ssrn.com/abstract=1791743>, pp. 21 ff.

⁹⁹ *Id.* See also *Re: Hydrogen Peroxide*, *supra* n. 81, at 320–321.

¹⁰⁰ *Id.* at 373; see also pp. 359–361.

¹⁰¹ See e.g. Sarah Rajski, *In Re: hydrogen Peroxide: reinforcing rigorous analysis for class action certification*, 34 Seattle U.L. Rev. 577, 603–604 (2011) ; Robert G. Bone and David S. Evans, *Class certification and the substantive merits*, 51 Duke L. J. 1251, 1328–1330; Nagareda, *Common answers for class certification*, Vanderbilt Public Law Research Paper No 10-33 at 18–19; see also Bozanic, *Striking an efficient balance: making sense of antitrust standing in class action certification motions*, Pennsylvania State University Dickinson School of Law, Legal Studies Research Paper No 17-2010, available at: <http://ssrn.com/abstract=1556016> at 34–35.

¹⁰² *Id.*, p. 4.

¹⁰³ See e.g. *mutatis mutandis*, In *Re: Rhone Poulenc Rohrer*, 51 F3d 1293 at 1298 (per Posner J); for commentary, see e.g. Jacobson & Choi, *Curtailling the impact of class certification on antitrust policy*, 66 NYUANSAL 549, 554–555 (2011) . Cf. e.g. Silver, *We're scared to death: does class certification subject defendants to blackmail?*, University of Texas School of Law, Public Law and Legal Theory Research Paper No 043, available at: http://ssrn.com/abstract_id=334900, pp. 3–4.

¹⁰⁴ See *inter alia*, *mutatis mutandis*, Gentry, *Bathke v Casey's General Stores, Inc: redefining the appropriateness of class certification in antitrust cases*, 22 J. Corp. L. 115, 128 (1996–1997); also Samuel M. Hill, *Small claimants and class actions: deterrence and due process examined*, (1995–1996) 19 Am. J. Tr. Advoc. 147, 150–152; See e.g. Silver, *We're scared to death: does class certification subject defendants to blackmail?*, University of Texas School of Law, Public Law and Legal Theory Research Paper No 043, available at: http://ssrn.com/abstract_id=334900, especially pp. 21–23, 37–38 and 53–54.

¹⁰⁵ Evans, *The new consensus on class certification*, Occasional Paper, January 2009, available at: <http://ssrn.com/abstract=1330594>, pp. 2–3.

system in their favour in order to make this phase of the litigation lengthier and costlier.¹⁰⁶ Thus, it was suggested that an overtly cautious certification inquiry could de facto jeopardize the goals of antitrust litigation by denying their ‘day in court’ to those claimants that it was designed to assist.¹⁰⁷

It was added that this outcome could be exacerbated by the ongoing tendency of the US federal Courts – partly motivated by concerns arising from the role of class counsel in these cases – to adopt a narrow interpretation of the substantive rules governing liability under Section 4 of the Clayton Act¹⁰⁸ and to require prospective claimants to spell out a ‘plausible’ prima facie claim as to the relief being sought,¹⁰⁹ allegedly to avoid ‘settlement blackmail’.¹¹⁰ As a result, it was argued that while the rationale for class litigation of antitrust issues remains in itself sound, unduly complicating the admissibility and the certification stages could dissuade potential class representatives to access the Courts.¹¹¹

In light of the above, it is concluded that the ‘scrupulous’ approach to the certification inquiry developed by the US higher Federal Courts in respect to antitrust claims has increasingly acted as a filtering mechanism designed to limit class treatment only to those claims that are truly suitable to being litigated via representation. Together with the assessment of the existence of a prima facie allegation of antitrust injury, this appraisal contributes to allowing the certifying court to act as an effective ‘gatekeeper’ by limiting access to justice under Rule 23(b)(3) only to meritorious group claims grounded in Section 4 of the Clayton Act. Consequently, it is argued that the Commission’s claim that opt-out class actions would not deliver on goals of efficient, yet at the same time fair adjudication seems at least questionable.

2.4 ‘WHO’ CAN SUE? THE NAMED PLAINTIFF AND CLASS COUNSEL IN THE CONTEXT OF CLASS CERTIFICATION: THE REQUIREMENTS OF ‘TYPICALITY’ AND OF ‘ADEQUACY OF REPRESENTATION’

After having discussed the current trends characterizing the commonality and predominance inquiry in class certification decision adopted by the US Federal Courts, this section will focus on the identity and the qualities of the

¹⁰⁶ See e.g. Silver, *We’re Scared to Death: Does Class Certification Subject Defendants to Blackmail?*, University of Texas School of Law, Public Law and Legal Theory Research Paper No 043, available at: http://ssrn.com/abstract_id=334900, especially pp. 53–54.

¹⁰⁷ See e.g. Samuel M. Hill, *Small Claimants and Class Actions: Deterrence and Due Process Examined*, 19 Am. J. Tr. Advoc. 147, 150–152 (1995–1996).

¹⁰⁸ Jacobson & Choi, *supra* n. 103, at 555–556; see *Verizon Telecommunications Inc v. Legal Offices of Curtis V Trinko LLP*, 540 US 398 at, e.g., 413–414.

¹⁰⁹ *Bell Atlantic Corp. v. Twombly*, 550 US 544 at 557–558.
¹¹⁰ *Id.*, at 558–559.

¹¹¹ See e.g. Jacobson & Choi, *supra* n. 103, at 563–564.

representative plaintiff and of his or her counsel for the purpose of certification. It is well known that one of the long-standing arguments brought against opt-out class actions arises from the perceived lack of supervision of class counsel on the part of both the named plaintiff and the class as a whole, as a result of which counsel may be tempted to act in his or her own interest and not in that of the class.¹¹² Consequently, the Federal Rules of Civil Procedure, by requiring that the representative's claims be 'typical' to those of the class, have sought to ensure the fair and effective vindication of the rights of each class member.¹¹³ In addition, the class representative must show that they will be able to 'fairly and adequately' represent the class by employing counsel sufficiently 'competent' to litigate the action of not just his or her client but also the whole class's interests.¹¹⁴

According to the requirement of 'typicality' the class representative must 'be part of the class and possess the same interests and suffer the same injury as the class members',¹¹⁵ the 'most prominent consideration' being the 'absence of an adverse interest between the representative parties and other members of the class'.¹¹⁶ As with other certification requirements, the 'typicality' inquiry varies in relation to the type of antitrust breach being alleged and will normally focus on 'whether other members of the class have the same or similar injury, whether the action is based on conduct which is not special or unique to the named plaintiffs and whether other class members have been injured' in the same way as a result of the same practice.¹¹⁷ Thus, in respect to price-fixing allegations, it was held that since the complaint had arisen from the implementation of the same common scheme and the complainants were all 'typical purchasers' of the relevant products, the claim brought by the representative plaintiff was 'fairly encompassed' by the claims common to the class, despite the differences existing among individual members in terms of, *inter alia*, size or location.¹¹⁸

This appraisal can, however, become more complex in respect to antitrust allegations arising from, for instance, vertical practices: class complaints concerning franchising agreements have raised difficult questions, especially when collective lawsuits have involved both current and past (i.e., terminated) franchisees. For

¹¹² See 2011 Consultation document, p. 18.

¹¹³ See e.g. *East Texas Motor Freight Co Inc v. Rodriguez*, 431 US 395 at 403; also *Califano v. Yamasaki*, 442 US 682 at 700–701; *General Telephone Co of Southwest v. Falcon*, 457 US 147 at 160 for commentary see e.g. Issacharoff, "Governance and legitimacy in the law of class actions", (1999) Supreme Court Review 337 at 390; also Newberg, 4th Ed., sect. 3:13, pp. 317–318.

¹¹⁴ See e.g. N. C. Scott, *Don't forget me! The client in a class action lawsuit*, 15 Geo. J Leg. Ethics 561, 569–570, 573–574 (2001), ; also Newberg, 4th Ed., sect. 3:21, p. 40. See e.g. *Marcera v. Chinlund*, 595 F2d 1231 at 1239; also *Gonzalez v. Cassidy*, 474 F2d 67 at 72–73.

¹¹⁵ *General Telephone Co of Southwest v. Falcon*, 457 US 147 at 156.

¹¹⁶ Re: Catfish Antitrust Litigation, 826 F Supp 1019 at 1034.

¹¹⁷ *Id.*, at 1036.

¹¹⁸ *Id.* See also In Re: NASDAQ, 169 FRD 493 at 510–511.

instance, in *Meineke* the 4th Circuit of the Court of Appeals found that a ‘conflict of interests’ existed between the named plaintiff and part of the proposed class¹¹⁹ on the ground that there were significant differences as to the content of the contracts concluded by the defendant with individual class members.¹²⁰ Consequently, it was found that the interests of some would be plaintiffs were inconsistent with those of others, including the named claimant’s, and that this conflict was especially apparent in respect to the remedy being sought.¹²¹ The typicality appraisal is also often complex as regards allegedly unlawful tying claims: it was held in several decisions that in these cases the named plaintiff’s complaint could be considered ‘typical’ to the class if it could be proven via evidence of contractual practices that were applied in the same way across the class, for instance because the class complaint stemmed from the generalized stipulation of standardized contracts.¹²²

The adequacy of representation requirement, instead, shifts the focus of the certification inquiry to the ‘competency of class counsel’; it ensures that the action can be ‘vigorously litigated’ and thereby secure the due process rights of the absent plaintiffs by means of the services of ‘qualified counsel’,¹²³ i.e. of a lawyer who is sufficiently ‘qualified, experienced and generally able to conduct the proposed litigation (...)’.¹²⁴ In particular, this requirement seeks to avoid that the named plaintiff become ‘involved in a collusive suit’ with the defendant or in any event hold interests that are antagonistic to those of the class.¹²⁵ Fulfilling this condition is particularly important in antitrust cases, due to their complexity and, consequently, to the need to ensure that these claims are litigated by sufficiently proficient counsel.¹²⁶ At the same time however the Courts have acknowledged that these objectives should be reconciled with the need to allow access to justice to all the victims of antitrust breaches: it was especially feared that an increased reliance on the ‘adequacy’ of class representative condition could stifle future class

¹¹⁹ *Broussard v. Meineke Discount Mufflers Shops, Inc.*, 155 F3d 331 at 336–338.

¹²⁰ *Id.*, at 339–340.

¹²¹ *Id.*; see also, *mutatis mutandis*, *Duchardt v. Midland National Life Insurance Co Inc*, 235 FRD 436 at 445. For commentary, see e.g. Marcus, *Reviving judicial gatekeeping of aggregation: scrutinizing the merits of class actions*, 79 GWL.Rev. 324, 344–345 (2011).

¹²² See e.g. *Re: Apple iPod/iTunes Antitrust Litigation*, (2008), unrep. WL 5574487, decision of Dec. 22, 2008, at 3, 5–6; also *Freedland v. AT & T*, 238 FRD 130 at 141.

¹²³ See Newberg, 4th Ed., sect. 3:21, p. 40; also, Scott, *supra* n. 114., pp. 573–574. See e.g. *Marcera v. Chinlund*, 595 F2d 1231 at 1239; also *Gonzalez v. Cassidy*, 474 F2d 67 at 72–73.

¹²⁴ *Eisen v. Carlisle & Jacqueline*, 391 F2d 551 at 562.

¹²⁵ *Id.*

¹²⁶ *Kirkpatrick v. JC Bradford & Co*, 827 F2d 718 at 727. See also, *inter alia*, *Dolgow v. Anderson*, 43 FRD 472 at 494; In *Re: Catfish Antitrust Litigation*, 826 F Supp 1019 at 1037–138; *Lewis v. NFL*, 146 FRD 5 at 10. For commentary, *inter alia*, Newberg, 4th Ed., sect. 18:11 at p. 18:36–37; also Scott, *supra* n. 114, pp. 571–572.

complaints by placing the named claimant under an excessively onerous obligation to ‘take an active part’ in the litigation.¹²⁷

In light of the above analysis, it is concluded that the Commission’s assertions that lodging a class action under Rule 23(b)(3) FRCP is an option open to ‘anyone’ sound very difficult to justify. It is argued that the inquiry into the typicality and the adequacy of representation place appropriate limits to the availability of collective litigation, for the purpose of avoiding ‘misalignments of interests’ between the named plaintiffs and the class and of securing appropriate levels of professional competency in conducting the proceedings,¹²⁸ thus upholding the fairness of representative litigation.¹²⁹

3 ‘OPT OUT’ ACTIONS AND COLLECTIVE ANTITRUST COMPLAINTS: A ‘CLASS ACTION’ FOR EU COMPETITION LAW LITIGATION?

3.1 THE APPLICATION OF RULE 23(B)(3) TO ANTITRUST CASES: LEARNING LESSONS FROM THE CASE LAW OF THE US FEDERAL COURTS IN RESPECT TO CLASS CERTIFICATION?

The previous sections briefly examined some of the aspects of certification in antitrust cases and emphasized how the conditions laid down in Rule 23(b)(3) have acted as an effective ‘screening’ mechanism to ensure that only those claims that can be appropriately, efficiently and fairly litigated by representation can actually benefit from class treatment.¹³⁰ Against this background it could legitimately be questioned whether the Commission’s ongoing refusal to discuss ‘US style’ class actions as one of the options for the framing of collective redress remedies in EU law, for the purpose of furthering goals of access to justice and of compensation of harm caused by anti-competitive practices, is tenable. It is argued that the scrutiny conducted by the certifying courts over new class complaints can effectively deal with the concerns voiced by the Commission. Consequently, it will now be considered whether, if they are assisted by similarly exacting requirements as to the ‘suitability’ of the claim to adjudication via representation, actions akin to

¹²⁷ See e.g. in *Re: Discovery Zone Securities Litigation*, 169 FRD 104 at 108–109; also Kirkpatrick, *supra* n. 126, at 727; *Re: Catfish*, *supra* n. 126, at 1037–1038; Lewis, *supra* n. 126, at 11–12.

¹²⁸ *Id.* See also, *mutatis mutandis*, *Edison v. EEOC*, 446 US 318 at 331.

¹²⁹ Falcon, *supra* n. 115, at 157, fn. 13.

¹³⁰ See e.g. *mutatis mutandis*, Falcon, *supra* n. 115, at 157, fn. 13. For commentary, see *inter alia*, John C. Coffee, *Understanding the plaintiff’s attorney: the implications of economic theory for the private enforcement of law through class and derivative actions*, 86 C. L. Rev. 669 at 677–679 (1986); also *inter alia*, *Blum v. Stenson*, 465 US 886 at 900.

the US style opt-out lawsuits could be considered as a possible option in the discussion of these questions within the spectrum of EU law.

3.2 COLLECTIVE ACTIONS IN EU COMPETITION LAW: CURRENT ISSUES AND FUTURE CHALLENGES

It was illustrated above that although boosting the rate of private competition enforcement constitutes a major concern for the EU Commission, its position has always been set against including opt-out actions as one of the 'suitable options' to this end.¹³¹ On the basis of the examination of the more recent case law of the US higher Federal Courts in the field of class certification of collective antitrust complaints,¹³² it will now be considered whether 'opt out'-type actions could be 'made to fit' within the principles (and the limits) of EU competition law, as well as in the wider context of the whole spectrum of tort law, as envisaged by the Commission itself.¹³³

It was anticipated that according to the Commission, the eminently 'compensatory' nature of competition damages' actions would be incompatible with the provision of 'incentive to sue', such as not only the award of 'enhanced compensation' (e.g., via a damages multiplier) but also of the availability of class actions.¹³⁴ In its 2008 White Paper the Commission suggested that the potentially broad scope of the proposed classes would be likely to turn the *Crehan* damages remedy from a 'restorative' tool into an instrument for the financial punishment of anti-competitive behaviour.¹³⁵ It was argued that even without the presence of a damages' multiplier the threat of financial exposure arising from allowing a collective claim to proceed via representation would have a 'blackmail effect' on defendants that may not be compatible with the rationale assigned to these actions by EU law.¹³⁶

Additional concerns were raised in respect to the implications that similar actions could have on the litigation systems existing in individual Member States.

¹³¹ See 2008 White Paper, section 2.1.

¹³² See e.g. In Re: Hydrogen Peroxide Antitrust Litigation, 552 F3d 305; also, *mutatis mutandis*, *Wal-Mart Stores Inc v. Dukes*, 131 S. Ct. 2541.

¹³³ See 2011 Consultation document, para. 18.

¹³⁴ See e.g. Impact assessment document accompanying the 2008 White Paper, paras 286–288.

¹³⁵ 2008 White Paper, section 2.2; see also Impact Assessment document, paras 21–22.

¹³⁶ See Joined Cases 295–298/99, *Manfredi v. Lloyd Adriatico and others* [2006] ECR I-6619 at paras 58–59, 62–63; see also 2005 Staff Working Document, paras 198–201; see also *mutatis mutandis*, In Re: Rhone Poulenc Rohrer, 51 F3d 1293 at 1298 (per Posner J); for commentary, see e.g. Jacobson and Choi, *Curtailing the impact of class certification on antitrust policy*, 66 NYUANSAL 549, 554–555 (2011). Cf. e.g. Silver, *We're scared to death: does class certification subject defendants to blackmail?*, University of Texas School of Law, Public Law and Legal Theory Research Paper No 043, available at: http://ssrn.com/abstract_id=334900, pp. 3–4.

As is well known, the Commission took the view in its 2004 Green Paper that opt-in and representative actions would constitute the only ‘appropriate’ mechanisms for collective redress in EU competition law since they would remain consistent with ‘traditional’ patterns of litigation throughout the Member States.¹³⁷ These views were recently confirmed in respect to collective tort claims generally: in its 2011 Consultation Paper on collective redress the Commission expressed the view that opt-out lawsuits would not be compatible with the ‘European legal tradition’.¹³⁸ It is however legitimate to query what this ‘tradition’ actually entails in respect to group litigation: are these ‘European’ litigation patterns still strongly linked to principles of ‘personality’ and of individual’s control over one’s litigation? Or have they changed in response to the changing demands of a society in which ‘diffuse’ torts, having a wide-ranging impact, are increasingly common?

It should be emphasized that a number of national legislatures throughout the Union have introduced mechanisms for collective redress of diffuse torts in their jurisdictions, some of which resemble quite closely the US style opt-out class actions. Norway, for instance, has allowed both opt-in and opt-out class actions since January 2008, subject to a requirement similar to the notion of ‘commonality’ and, in the case of opt-out certification, of a requirement to give notice. In particular, opt-out actions are expressly reserved for ‘low value’ claims, which would otherwise be unlikely to reach the courts.¹³⁹

Similar rules were enacted in 2005 by the Dutch Parliament, albeit only to allow for the collective settlement of tort actions:¹⁴⁰ the proposed settlements are scrutinized by the Amsterdam Court of Appeals which decides whether they are ‘fair’ and whether the class of those affected by the harmful practices has been accurately and fairly identified.¹⁴¹ If it approves the settlement, the Court sets a time limit to allow the named plaintiff to notify the class members and thereby enable them to opt-out of the class.¹⁴² Furthermore, Portuguese legislation has allowed ‘popular actions’ since 1995: these actions follow the opt-out model and permit the named plaintiff to represent ‘on his own initiative and without the need for a mandate or express authorization, all the holders of the rights and interests in question’, subject to the requirement of notice and to the right, conferred on all

¹³⁷ 2004 Green Paper, section 2.5; see also 2005 Staff Working Document, paras 200–201.

¹³⁸ 2011 Consultation document, para. 17.

¹³⁹ Norwegian Disputes Act (No 90/2005), Chapter 35; see R. Gaudet, *Turning a Blind Eye: The Commission’s Rejection of Opt Out Class Actions Overlooks Swedish, Norwegian, Danish and Dutch experience*, 30 Eur. Competition L.Rev. 107, 112 (2009) .

¹⁴⁰ Dutch Code of Civil Procedure, Artt. 1013–1018.

¹⁴¹ Art. 1016; see Gaudet, *supra* n. 140, at p. 114.

¹⁴² Gaudet, *supra* n. 140, p. 115.

the class members, to opt-out of the action.¹⁴³ Article 17 of Law No. 83/1995 confers special powers to the courts, by enabling them to collect evidence on their own initiative and suspend the effects of the final decision in the event of an appeal against it.¹⁴⁴ Also, if the named plaintiff decides to abandon the lawsuit or holds interests in conflict with those of the class, the Public Prosecutor is allowed to step in the proceedings and conduct the litigation on behalf of the class, thus relieving the representative claimant.¹⁴⁵

The class action introduced by the Italian Parliament is broadly similar: Law No 99/2009, in force since January 2010, provides for an American style class action by empowering individuals to institute representative proceedings on behalf to all those who have been equally adversely affected by the same piece of allegedly harmful conduct.¹⁴⁶ The Act also strengthens the judicial powers of scrutiny on the admissibility and the case management of these claims¹⁴⁷ and prevents the defendant from seeking to resolve the dispute out of court once the claim has been authorized to proceed as a class action, to prevent settlement blackmail.¹⁴⁸ Importantly, Article 49 thereof precludes any claimant belonging to the class who did not opt-out of the original collective lawsuit from lodging a claim against the defendant in respect to the same legal and factual issues that have already been dealt with, thus recognizing *res judicata* effect to the class judgment.¹⁴⁹

It is suggested that these recent legislative developments may be read not only as evidence of a recognition of the importance of collective actions as a means of protecting the rights and interests of individuals affected by the consequences of economic behaviour having a diffuse harmful impact, such as competition infringements.¹⁵⁰ They can also be regarded as potentially contradicting the Commission's views that opt-out class actions would be inconsistent with the rules governing civil litigation in the Member States. It should be emphasized that already in the 2008 White Paper the Commission had recognized the absence of evidence of 'abuses' stemming from the application of the Dutch legislation

¹⁴³ See Sousa Antunes, "Class actions, group litigation and other forms of collective litigation", report submitted to the Centre for Socio-Legal studies, University of Oxford (2007), available at: http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf, p. 6; see also pp. 10–11.

¹⁴⁴ *Id.*, pp. 11–12.

¹⁴⁵ *Id.*, p. 16.

¹⁴⁶ See Naishi, *Italy's class action experiment*, 43 Cornell Intl. L. J. 147, 168–170 (2010) .

¹⁴⁷ *Id.*, p. 168.

¹⁴⁸ *Id.*, p. 169.

¹⁴⁹ *Id.*, p. 165.

¹⁵⁰ *Inter alia*, see Gaudet, *supra* n. 140 , pp. 119–120.

commented above,¹⁵¹ linking it to the absence of other ‘incentives to sue’, such as fee-shifting.¹⁵²

Against this background, it may be questioned whether the Commission’s ongoing preference for ‘opt in’ and ‘representative’ actions remains justifiable in light of the motivations expressed in, *inter alia*, the 2008 White Paper. It is acknowledged that in the absence of harmonization, the principle of national autonomy allows the Member States to choose what type of collective remedy to provide for the protection of rights grounded in EU law, including the right to seek compensation for harm suffered as a result of ‘diffuse’ anti-competitive behaviour.¹⁵³ However, it is suggested that, as the experience of the United Kingdom has shown, restricting these options only to ‘opt in’ and ‘representative’ claims may not always provide the ‘right’, in the sense of most effective solution to these questions.¹⁵⁴ As is well known, Section 47A of the UK Competition Act 1998 confers on ‘recognised representative bodies’ the right to stand in judgment and bring follow on actions (i.e., tort actions designed to recover damages arising from anti-competitive behaviour for which the defendant has already been found responsible by the Office of Fair Trading) for damages before the Competition Appeals Tribunal.¹⁵⁵ While this remedy does not prejudice the right to bring an action for damages before the High Court according to the normal rules of procedure, it is undeniable that the take up of new actions has remained very low.¹⁵⁶

Commenting on the only such case lodged with the CAT so far (and settled out of court), i.e. the ‘Football Replica Kit’ price-fixing action,¹⁵⁷ Leskinen highlighted the difficulties associated with taking advantage of the opt-in action model provided by the Competition Act and open to representative bodies.¹⁵⁸ She observed that the need to launch a ‘media campaign’ to attract adherents to the action, taken together with the legal costs and the financial burden linked to

¹⁵¹ 2008 staff working paper accompanying the White Paper, p. 17, fn. 24.

¹⁵² *Id.*; see also, *inter alia*, Rizzuto, *supra* n. 161, at 57–58.

¹⁵³ See *inter alia*, Case 45/76, *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043 at para. 13. See e.g. Firat Cengiz, *Antitrust damages’ action: lessons from American indirect purchasers’ litigation*, 59 ICLQ 39, 55–56 (2010).

¹⁵⁴ See e.g. Rodger, *Competition law litigation in the UK courts: a study of all cases 1995–2008: Part I*, 2 GCLR 93, 98–99 (2009).

¹⁵⁵ See e.g. *Albion Water Ltd v. Dwr Cymru Cyfyngedig* [2010] CAT 30; for commentary, see, *inter alia*, Rodger, *Private enforcement and the Enterprise Act: an exemplary system of awarding damages?*, 24 Eur. Competition L.Rev. 103 at 105 (2003); see also Lever, *Restructuring courts and tribunals hearing UK and EC competition cases*, Competition L.J. 47 (2002).

¹⁵⁶ See Rodger, *supra* n. 155), pp. 98–101 (this study lists only 6 cases lodged with the High Court until 2005 and only one with the CAT, brought by a representative body, i.e. *Consumers Association v. JJB Sports (Re: Football Replica Kit)*, [2009] CAT 2.

¹⁵⁷ *Consumers Association v. JJB Sports (Re: Football Replica Kit)*, [2009] CAT 2.

¹⁵⁸ Leskinen, *Recent developments on collective antitrust damages actions in the EU*, 4 GCLR 79 at 80–81 (2011).

acquiring evidence contributed to making this remedy unattractive.¹⁵⁹ Consequently, it is perhaps not surprising that individual litigants have sought to overcome the shortcomings of the current framework by seeking to rely on existing, generally applicable procedural rules, such as the right to bring actions on behalf of other claimants sharing a ‘common interest and a common grievance’, provided in Rule 19(6) of the Crown Procedural Rules (CPR).¹⁶⁰ It is suggested that the *Emerald Supplies* litigation constitutes one such attempt.

The limited purvey of this work does not allow for a detailed examination of this case. It is reminded that *Emerald Supplies* arose from an action brought by several flower traders in the English Courts. The plaintiffs sought to recover damages against the respondent on the ground that they had allegedly been adversely affected by the price-fixing conspiracy, for which BA had been placed under investigation by the Office for Fair Trading.¹⁶¹

In their claim the plaintiffs also asserted to be representatives of all other purchasers of BA’s freight services who had allegedly paid inflated prices on the ground that they had shared the same interests, having been affected by the same unlawful practice.¹⁶² However, the action was dismissed on the ground that the plaintiffs had failed to show the existence of a ‘common interest’ and of a ‘common grievance’ for all the members of the proposed class at all stages of litigation, so that the remedy being sought would be ‘beneficial to all’, as required by Rule 19(6) of the Crown Procedural Rules, on which the ‘representative element’ of their claim had been based.¹⁶³

Morritt J, for the Chancery Division, held that since the question of whether a shared interest existed across the class hinged on the issue of the existence of damages’ liability,¹⁶⁴ until the case had been decided on the merits, the court would have been in no position to determine who had been affected by the defendant’s unlawful behaviour and as a result what the confines of the proposed class would have been.¹⁶⁵ Lord Justice Mummery, for the Court of Appeal, concurred and added that since the proposed class comprised both direct and indirect purchasers, whose legal positions were likely to have been affected in different ways as a result of the allegedly unlawful practice,¹⁶⁶ a ‘conflict of interests’ would have probably emerged, thus preventing representative litigation.¹⁶⁷

¹⁵⁹ *Id.*, p. 80.

¹⁶⁰ See e.g. Mulheron, *Recent milestones in class action reform in England: a critique and a proposal*, 127 (Apr) LQR 288 at 293–294 (2011) .

¹⁶¹ See e.g. [2010] EWCA Civ 1284 at para. 60.

¹⁶² *Id.*, at para. 61.

¹⁶³ *Id.*, at para. 33; see also [2009] EWHC 741 (Ch), at paras 34–35.

¹⁶⁴ [2009] EWHC 741 (Ch) at para. 35.

¹⁶⁵ *Id.*, paras 35–36.

¹⁶⁶ [2010] EWCA Civ 1284 at 62–63.

¹⁶⁷ *Id.*, at 63–64.

The *Emerald Supplies* case was widely debated and the limited remit of this work does not allow for its detailed discussion.¹⁶⁸ It should however be emphasized that the litigation represented an attempt to rely on existing domestic rules of procedure to redress the harmful consequences of conduct allegedly incompatible with the UK and EU competition rules to which it was felt that no satisfactory response, especially in compensation terms, could be provided under domestic law.¹⁶⁹ On this point, it is suggested that the absence of an infringement decision made it especially difficult for ‘low value’ claimants to lodge an action collectively, given their inability to access the CAT under Section 47A of the Competition Act 1998 and the corresponding difficulties associated with seeking relief before the High Court.¹⁷⁰ Consequently, it is not surprising that the Court of Appeal’s dismissal of the action was criticized as a ‘lost opportunity’ to fill the gaps existing in the system for the collective redress of ‘diffuse wrongs’, whether in competition law or more generally in the law of torts.¹⁷¹

More generally, it could be argued that the *Emerald Supplies* litigation represents a very apt example of the limitations of the private competition enforcement framework available to prospective claimants before the English courts and especially of the obstacles stemming from the choice, made in the Competition Act, to limit the array of options only to certain types of collective actions, namely opt-in and representative lawsuits. Accordingly, it may be queried whether, had an ‘opt out’ action been available to the plaintiffs in this case, they could have had a better chance of obtaining redress of the harm allegedly caused to them by British Airways’ prima facie unlawful behaviour.

It is acknowledged that speculating on the suitability of opt-out action to litigation before the English courts may not be entirely appropriate, given the ongoing scepticism shown by several agencies as regards this type of group actions.¹⁷² However, it is suggested that, as it is illustrated by the *Emerald Supplies* decision, the High Court and the Court of Appeal have been willing to engage in

¹⁶⁸ See e.g. Mulheron, *Recent milestones in class action reform in England: a critique and a proposal*, 127 (Apr) LQR 288 (2011); Id., *Emerald Supplies Ltd v. British Airways: a century later the ghost of Market lives on*, 8 Competition L.J. 159 (2009); Hodges, *Collective redress in Europe: the new model*, 29 C.J.Q. 370 (2010).

¹⁶⁹ See most recently, Barling, *Collective redress for breach of competition law—a case for reform?*, 10 Competition L.J. 5 (2011).

¹⁷⁰ See e.g. Mulheron, *A missed gem of an opportunity for the representative rule*, University of Cambridge Faculty of Law research paper No 18/2011, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1837479, pp. 2–3.

¹⁷¹ Mulheron, *supra* n. 171), pp. 13–14.

¹⁷² See e.g. Lord Chancellor’s Department, “Representative claims: proposed new procedures” (February 2001), available at: <http://www.dca.gov.uk/consult/general/repclaims.htm>, paras 13 and 19–20; see also Woolf, “Access to Justice: Final Report to the Lord Chancellor on the Civil Justice system in

a scrupulous scrutiny of the complaint with a view to assessing whether it was suitable to being adjudged by representation under CPR Rule 19(6) and thereby addressing many of the concerns for the fairness and efficiency of this type of litigation.¹⁷³

Although the action in question is different from the opt-out class action regulated by Rule 23(b)(3) FRCP, it may be argued that the assessment conducted in the *Emerald Supplies* decision shares some common traits with the certification inquiry conducted by the US Federal Courts in their more recent case law. It is submitted that the Chancery Division's and the Court of Appeal's concerns for ensuring that all the class members share the same 'grievance' and that the remedy being sought be 'beneficial to all' are broadly consistent with the assessment, conducted, *inter alia*, by the US Court of Appeals to ensure the 'cohesiveness' of the proposed class.¹⁷⁴ In addition, the emphasis placed on the need to prevent 'conflicts of interests' between the class members as to the nature of the remedy being sought, especially those conflicts arising from the different nature of their claim or from the existence of individual defences, is also reminiscent of the typicality inquiry.¹⁷⁵ Thus, although the disappointment voiced by several commentators as regards the outcome of *Emerald Supplies* is understandable, the appraisal conducted at admissibility stage may cautiously be welcomed as a step forward in reconciling, in each case, the goals of efficient adjudication and of procedural fairness.¹⁷⁶

In light of the above analysis it is concluded that, although the objectives of fairness and efficiency in the adjudication of collective, often factually complex, disputes, should guide any discussion in this area, the continuing scepticism shown by the Commission as regards the 'viability' of US style opt-out actions in the EU is becoming increasingly difficult to maintain, especially since it appears to be very much 'out of step' vis-à-vis the status quo of the litigation rules existing in individual European jurisdictions.

England and Wales", 1996: London, HMSO, Chapter 17. For commentary, see *inter alia* Sorabji, "The hidden class action in English civil procedure", (2009) 28(4) CJK 498, pp. 511-512.

¹⁷³ See *inter alia*, Woolf, *supra* n. 173, Chapter 17, paras 6-7.

¹⁷⁴ *Inter alia*, re: Hydrogen Peroxide, *supra* n. 100, at 321-322.

¹⁷⁵ See e.g. *General Tel. Co of Southwest v. Falcon*, 457 US 147 at 160; more recently, see *In re: Live Concert Antitrust Litigation*, 247 FRD 98 at 107.

¹⁷⁶ See Mulheron, *supra* n. 171, at pp. 10-12.

4 BETWEEN 'REALISM' AND 'PREJUDICES': TIME FOR AN OPEN DISCUSSION ON THE COLLECTIVE REDRESS OF COMPETITION INJURIES: AND BEYOND? TENTATIVE CONCLUSIONS

The earlier sections discussed some of the issues and trends characterizing the debate on the theme of private competition enforcement in the EU and especially on the role of collective redress mechanisms as a means to boost access to justice for parties affected by these 'widespread' injuries.¹⁷⁷ It was emphasized that no concrete measures have been adopted to either improve existing domestic mechanisms or introduce new ones at EU level. While this outcome may be regarded as broadly consistent with the principle of national autonomy,¹⁷⁸ it was argued that short of a 'EU wide' solution, the currently patchy and piecemeal solutions adopted by individual Member States may not always allow claimants to seek relief for small value and potentially numerous and thereby repetitive (if lodged individually) claims.¹⁷⁹ Therefore, it was suggested that the Commission's decision to take the debate on collective redress 'out of the particular', i.e. out of specific policy fields, such as, *inter alia*, competition policy, and 'into the general', by seeking to frame and propose possible options against the wider background of tort law as a whole¹⁸⁰ can be interpreted as evidence of its willingness to secure consensus in support of a uniform, generally applicable set of rules governing group civil lawsuits.¹⁸¹

However, what remains to some extent worrying is the restrictive range of options identified by the Commission in this context: it was illustrated how the 2011 Consultation document expressly excluded opt-out class actions, ostensibly in order to limit the risk of 'abuse of process' and, in respect to competition actions, to uphold their 'restorative' function.¹⁸² However, it was questioned whether this position and the justifications adduced to support it are sustainable today. It was illustrated how the US Federal Courts have increasingly relied on the certification inquiry in order to identify only those claims that, according to Rule

¹⁷⁷ See *inter alia* 2004 Green Paper, section 2.5; see also 2008 White Paper, paras 198–201; more recently, 2011 Consultation document, para. 4, 9.

¹⁷⁸ See e.g. Swaak and Kortmann, "The EC White Paper on antitrust damages actions: why the Member States are right to be (less than) enthusiastic", (2009) 30(7) ECLR 340 at 341–342.

¹⁷⁹ See 2011 Consultation document, paras 9–11.

¹⁸⁰ *Id.*, paras 12–14.

¹⁸¹ See e.g. Report on the White Paper on damages actions for breach of the EC antitrust rules, Mar. 9, 2009, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2009-0123&format=XML&language=EN,sect.J5-J6>; for commentary, see *inter alia* Cengiz, *Antitrust damages' action: lessons from American indirect purchasers' litigation*, 59 ICLQ 39, 55–56 (2010); also Marcos and Sanchez—Graells, "Toward a European tort law? Damages action for breach of EC antitrust rules: harmonising tort law through the back door", available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028963, pp. 6–7.

¹⁸² See e.g. Impact Assessment Document, accompanying the 2008 White Paper, paras 286–288.

23(b)(3), are truly suitable to being litigated via representation, especially due to the nature of the class and to the evidence *prima facie* proffered to prove the existence of the elements of the alleged infringement.¹⁸³ In addition, the brief examination of the legislation in force in a number of Member States, which now allow for ‘US style’ class actions, provided clear evidence of the acceptance of these lawsuits as a ‘suitable’ tool for collective redress in several jurisdictions.

Against this background, it is argued that opt-out actions can no longer be dismissed as incompatible with the accepted patterns of litigation across the Union or indeed as a source of ‘abuse of process’, as asserted by the Commission.¹⁸⁴ It is submitted that these actions can contribute to boosting the private enforcement of the competition rules, the access to justice and the fairness of adjudication of claims arising from the consequences of widespread, ‘diffuse’ torts, without endangering the overall fairness of litigation.¹⁸⁵ It is suggested that the *Emerald Supplies* litigation has both provided evidence of the flaws of the English system, which is focused on opt-in and representative actions, and demonstrated the ability and the willingness of domestic courts to actively scrutinize the suitability of specific collective claims to being decided by representation.¹⁸⁶

It is submitted that provided that appropriate procedural limits and safeguards are in place to empower the domestic courts to act as ‘gatekeepers’ to the access to and as ‘guardians’ of representative litigation, opt-out actions could effectively complement other ‘preferred’ methods of collective dispute resolution and thereby help increasing the take up of competition damages’ and other ‘diffuse tort’ actions. It is argued that by allowing for adjudication by representation on behalf of all those similarly affected by the consequences of the same piece of harmful behaviour, these lawsuits could overcome the ‘inertia effect’ characterizing low value claimants, who would not spontaneously seek individual redress of their injuries, and consequently provide greater access to justice both more cheaply and more easily.¹⁸⁷ In this context, a ‘scrupulous’ certification inquiry focused on the homogeneity of interests across the class and on the *prima facie* availability of ‘class-wide proof’ for the elements of each infringement and an appropriate degree of oversight of litigation up to the end of the proceedings would contribute to

¹⁸³ See e.g. In Re: Hydrogen Peroxide Antitrust Litigation, 552 F3d 305; also, *mutatis mutandis*, *Wal-Mart Stores Inc v. Dukes*, 131 S. Ct. 2541.

¹⁸⁴ See e.g. 2011 Consultation document, paras 9–14.

¹⁸⁵ See *inter alia* Mulheron, *Recent milestones in class action reform in England: a critique and a proposal*, 127 (Apr) LQR 288 (2011); also Marcos and Sanchez-Graells, *supra* n. 182, p. 7–8.

¹⁸⁶ See e.g. Mulheron, *Emerald Supplies Ltd v. British Airways: a century later the ghost of Market lives on*, 8 Competition L.J. 159 (2009); also *id.*, “A missed gem of an opportunity for the representative rule”, University of Cambridge Faculty of Law research paper No 18/2011, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1837479, p. 3; see also pp. 11–12.

¹⁸⁷ See, *inter alia*, Hodges, *Collective redress in Europe: the new model*, 29 CJCQ 370, 375–376 (2010).

striking a fair balance between fairness and efficiency in the decision of these disputes.¹⁸⁸

It is therefore concluded that the EU Commission, rather than 'clinging on' to long-standing prejudices against class actions, should undertake a far wider-ranging discussion of the possible options for an effective framework of collective redress in the EU, not just for competition law but also in the wider context of tort law, especially to improve the conditions of recourse to the courts for those potential claimants who lack the financial wherewithal, the necessary knowledge or indeed the economic incentive to seek relief. While it is clear that the concerns for the effective and at the same time fair adjudication of 'diffuse injury' claims cannot be downplayed, it is hoped that the Commission will come to regard 'US style' opt-out actions no longer as a source of abuse but as an acceptable alternative to other forms of collective actions that are perhaps less controversial.¹⁸⁹

¹⁸⁸ See, *inter alia*, response of the Office of Fair Trading (OFT) to the 2011 Consultation document, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/office_fair_trading_en.pdf, pp. 5–6; for commentary, *inter alia*, Gaudet, *supra* n. 140, pp. 116–117.

¹⁸⁹ See, *inter alia*, the Response of the Civil Justice Council (CJC) to the 2011 Consultation document, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/cjc_en.pdf, para. 36.

- (1) Proposed contributions are invited and received on the understanding that they are final, and not preliminary drafts. They must not have been published or submitted for publication elsewhere and a statement to this effect should be included with the text submitted for publication. Only articles in English will be considered for publication.
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- (12) For cross-references, please use 'above' and 'below', e.g., as note 14 above.
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